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Education Law Newsletter

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SCC rules Quebec interfered with freedom of religion of English-speaking Catholic high School more than necessary

The Supreme Court of Canada, (SCC) in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, held that it was unreasonable for the Quebec Minister of Education to deny an exemption from teaching the Government's Ethics and Religious Culture (ERC) Program to Loyola, a private Catholic High School.

Pursuant to s. 22 of the *Regulation respecting the application of the [Education] Act respecting private education*, the Minister must grant an exemption from the ERC Program if the proposed alternative program is deemed to be "equivalent". Loyola requested an exemption on the basis that it taught an in-depth ethics and world religions course covering the same material as the ERC Program, except that it taught the course from a Catholic perspective using Jesuit pedagogy.

In 2010, Loyola obtained a favourable ruling from the Quebec Superior Court. The Superior Court decided that denying Loyola an exemption was unreasonable and that "*the ERC Program established by the Minister requires of Loyola a pedagogy contrary to the teachings of the Catholic Church*".

The Government appealed the ruling and the Quebec Court of Appeal ruled in the Government's favour. The Court of Appeal concluded that it was an insignificant infringement of religious freedom to require Loyola teachers to teach a course from a neutral perspective and refrain from expressing religious convictions during that particular course.

Following this loss in 2012, Loyola appealed to the SCC. A significant constitutional law issue that was raised was whether or not Loyola, as an institution, could claim to benefit from the *Charter* protection of freedom of religion. The main issue in the case was whether the Minister's decision to deny the exemption was reasonable. If and when *Charter* rights are implicated in a Ministerial decision, a reasonable decision will proportionately balance the relevant *Charter* protections to ensure they are limited no more than necessary given the statutory objectives.

Seven Supreme Court Justices heard the case. The Court issued two opinions, one signed by four judges (majority) and the other by three (minority). All seven Justices agreed that the Minister's decision was unreasonable, although the reasoning differed in some respects.

The majority concluded that freedom of religion in the *Charter* includes both the individual and collective aspects of religious belief and must account for the deep linkages between belief and its manifestation through communal institutions and traditions, although it did not rule on whether a religious organization, as an organization, enjoys the right to freedom of religion. The majority did find that a secular state cannot interfere with the beliefs or practices of a *religious group* unless they conflict with or harm overriding public interests.

The state has a legitimate interest in ensuring that students in all Schools are capable of conducting themselves with openness and respect as they confront cultural and religious differences. The majority found that preventing Loyola from teaching and discussing Catholicism from its own perspective did little to further the ERC Program's objectives, while at the same time seriously infringed freedom of religion. Moreover, it suggested that engagement with an individual's religion on his or her own terms could be presumed to impair respect for others. In that respect, the Minister's decision was not a proportionate balancing of *Charter* rights and legitimate statutory objectives.

Yet the majority decided that the Minister was not required to permit Loyola to teach about *other religions* from a Catholic perspective. If Loyola were allowed to do so, the majority reasoned, "*The resulting risk is that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism*". The majority went on to say that, in a High School where students are learning about the precepts of one faith throughout their education, "*it is arguably even more important that they learn, in as objective a way as possible, about other belief systems and the reasons underlying those beliefs*".

The minority, on the other hand, ruled that Loyola, *as a religious organization*, is entitled to the constitutional protection of freedom of religion. Where an organization is claiming this right, it must show that the religious belief or practice interfered with is consistent with both its purpose and operation. This can be assessed in light of the organization's other practices, policies and governing documents, and by the testimony of the organization's officials and representatives. The minority noted that the beliefs and practices of an organization may reasonably be expected to be less fluid than those of an individual, making historical evidence of its practices more relevant to its claim. In this case it was clear that Loyola consistently held to sincere religious beliefs and practices.

Another area where the minority and majority differed was with respect to Loyola's teaching of the ethics of other religions. The minority characterized Loyola's alternative program as:

(1) teaching Catholicism from a Catholic perspective, but teaching other religions objectively and respectfully;

(2) emphasizing the Catholic view on ethical question, but ensuring all ethical points are presented on any given issue; and,

(3) encouraging students to think critically and engage with their teachers and each other.

Therefore, when teaching Catholicism and ethics, Loyola would depart from the strict neutrality required by the ERC Program.

The minority held that requiring Loyola to teach Catholicism and ethics from a neutral perspective infringed Loyola's freedom of religion. The burden was on the Government to show that the insistence on purely secular program limited Loyola's freedom no more than necessary to achieve the ERC Program's goals. Nothing in the ERC Program's objectives (recognition of others and pursuit of the common good) or competencies (world religions, ethics, and dialogue) required a non-denominational approach, in the minority's view.

Rather, the legislative and regulatory scheme demonstrated an intention to allow religious Schools to teach the ERC Program without sacrificing their religious perspectives — an "entirely realistic" goal. The Minister took as her starting point the premise that only a secular approach can suffice as equivalent. The Minister adopted a definition of "equivalent" which read the individualized approach out of the legislative and regulatory scheme and made the protection contemplated by the exemption provision illusory.

Like the majority, the minority found that the Minister's decision limited religious freedom more than necessary and was therefore unreasonable. The final difference was with respect to remedy. The majority decided to send the matter back to the Minister for reconsideration in light of the Court's Judgment. The minority, however, believed it was neither necessary nor just to remit the matter to the Minister, thereby further delaying the relief Loyola has sought for years.

The SCC Decision is significant in dealing with the balancing of secularism in education and freedom of religion. ■

School board liable for harassment of teacher by student

The Alberta Human Rights Tribunal (Tribunal) heard a Complaint by teacher Vienna Malko-Monterrosa (Complainant) who had been frequently harassed by a Junior High School student over an approximate two-year period. The Complainant brought the Complaint against her employer, a Francophone School Board (Conseil). In *Malko-Monterrosa v Conseil Scolaire Centre-Nord*, 2014 AHRC 5, the Tribunal held the Conseil liable for discrimination and

awarded general damages of $7,500 for failing to take adequate measures to protect Ms. Malko-Monterrosa from harassment.

The Complainant was of Mexican descent and was born in Canada. The Complainant argued that the harassment amounted to discrimination in employment based on race, colour, ancestry, and gender, and that the Conseil should be held liable for it. She also argued that the Conseil further discriminated against her on the ground of race because it would have taken further measures to prevent the harassment if she were of French or French-Canadian ancestry rather than of Mexican descent.

The Tribunal dismissed the latter argument because it lacked any supporting evidence other than the Complainant's own perception. With respect to the first allegation, however, the Tribunal held that there was sufficient evidence. The evidence showed that much of the harassment involved offensive comments related to the Complainant's gender and race. There was also a great deal of evidence about the measures taken by the Conseil, and measures contemplated by the Conseil or requested by the Complainant but not taken. As a result, the Tribunal found that the Complainant was discriminated against on the prohibited grounds of race, colour, gender and ancestry, contrary to s. 7 of the *Alberta Human Rights Act* (Act).

The harassment began with several "prank calls" in which the caller disconnected when the Complainant answered. The student "S" eventually identified herself as the caller. The Complainant took steps to convey to S and her parent that this behaviour must cease. The Complainant told the Principal about the conduct, who offered her some advice on dealing with it. The Vice Principal, Ms. Dallaire, also told S's parent that S may not call her teacher. Ms. Dallaire also offered to S the use of the School's counselling service. S met only once with the School counsellor and was unwilling to meet further afterwards.

A few months later, the Complainant began to receive more prank phone calls. S had given out the Complainant's phone number to other students. According to Vice Principal Dallaire's evidence, this was because, in S's mind, the Complainant had formerly been nicer to S and S wanted a "tiny revenge" on the Complainant. The Complainant testified that Vice Principal Dallaire advised her to change her phone number, which she did although she felt the Conseil should have taken steps to prevent this from being necessary.

About six months later, in the next School year, the Complainant began receiving Facebook messages from S. One message said, "*hey sexy bitch. You and me lets get it on grrrrr I know where you live*." Another said, "*god if you actually think this is S your so stupid. I actually feel bad that i'm framing her, NOT! lmfao*."

The Complainant told the other Vice Principal, Mr. Potvin, about the messages. She testified that Vice Principal Potvin told her that the School was not responsible as the messages were sent through Facebook. She later talked to the Principal, at that time Ms. Lafleur, who spoke with S. S admitted sending both messages. A few days later, the two Vice Principals, the Principal, the Complainant, S's homeroom teacher, S's parent, and S, met and agreed that S would not contact the Complainant at School or otherwise and would not be permitted near the Complainant's classroom.

Principal Lafleur testified that she had a further meeting with the Vice Principals and it was decided that Vice Principal Potvin would provide closer support and supervision to S. Meanwhile, Principal Lafleur met several times with the Complainant and continued to check on her daily.

Nevertheless, in the next two months the Complainant received several emails from senders of various apparent identities, though most were from a sender identified as "Rachel Gibson" and one message was identified as

coming from S. These emails referred to the Complainant using several highly offensive and sexist terms and one threatened, "*you can't run away from me cunt I'll just get coming. you'll never find out who I am*."

The Complainant forwarded the emails to the Vice Principals and Principal. To her knowledge, they did not question S about the emails, although Principal Lafleur testified that a meeting was held with S concerning the emails and the consequences of sending them. The Principal had noticed by that time the impact on the Complainant. Still, the harassing emails continued. Steps were taken to block the sender "Rachel Gibson". Thereafter, two more emails from a sender identified as S arrived and another from a different name the Complainant did not recognize.

Soon afterwards, the Complainant asked Superintendent Henri Lemire to discuss steps the Conseil would take to resolve the situation. The Complainant was told that S would shortly be expelled and transferred to another School in the District, a School which the Complainant objected to because her mother was the receptionist at that School and she was concerned S might act inappropriately towards her. The Complainant testified that she was assured that if this happened, S would be moved to yet another School.

The next day, the Complainant received a handwritten letter of apology "*for all the emails I sent*" from S. The same day, the Complainant wrote a letter to the Principal with details of incidents she knew or believed had originated from S. The Vice Principal was able to determine, by having a class in which S was a member submit an electronic assignment, that the IP address from which S sent in her assignment was the same as that from which the "Rachel Gibson" emails were sent.

S had not yet been expelled. She was given a five-day suspension. In the meantime the Principal recommended expulsion to the Conseil. A week later, the Conseil expelled S and transferred her to the School in which the Complainant's mother was the receptionist. Conditions were attached to the transfer, including a prohibition on any contact by any medium or in person with the Complainant and a prohibition on entering the property of her former School.

About a month later, the Complainant received two additional Facebook messages from S calling her "*little miss priss*" and saying "*You have no friends in common*." A few weeks later, a handwritten letter was slipped under the Complainant's classroom door, containing a list of insults and threats and including such phrases as "*slut*," "*puta*," "*illegal immigrant*," "*piece of Mexican shit*," and "*go back to your country*." It was confirmed the letter was written by S and others and slipped under the door by a student who attended the Complainant's School. The students from the Complainant's School who were involved were suspended.

In the Complainant's view, the letter was a violation of the conditions of S's transfer and the Conseil was bound by those conditions to transfer S to another district. However, she was suspended for three days instead. The Principal of S's School, Mr. Tremblay, consulted Assistant Superintendent Bugeaud before making a decision. Ms. Bugeaud knew about the conditions but was concerned about the effect of another expulsion on S. Accounting for the fact that S's academic performance had been good and it was close to the end of the School year, she judged it was in S's best interests not to expel her.

Ms. Bugeaud emailed Principal Tremblay her rationale for suspending and noted that S had now made criminal allegations against the Complainant. A police investigation followed. A few days later the Complainant was advised by Principal Lafleur that S had emailed two students alleging that the Complainant had sexually assaulted S.

A police investigation revealed the allegations to be groundless and made in retaliation for expulsion. The Complainant then met with Superintendent Lemire and Mr. Préfontaine, counsel for the Alberta School Board Association (ASBA), and requested that the Conseil protect her against further harassment or false allegations by issuing a cease and desist letter to S. Instead, she was presented with three options. Mr. Préfontaine suggested, (1) that she seek a peace bond, (2) that a letter could be sent to S and her parent, or, (3) that she contact the Alberta Teachers Association to obtain a lawyer to support her and represent her interests in relation to S's misconduct.

Just three days later, S sent emails to two students in which she accused the Complainant of sexual assault. The next day the Complainant again asked Superintendent Lemire for a cease and desist letter, although this request was apparently based not on the emails but on S's attempt to deliver an envelope to the Complainant's mother, which she refused to accept. Mr. Lemire issued a cease and desist letter, but when he found out that it was an apology to the Complainant's mother that S had tried to deliver, he retracted the letter.

A few days later Mr. Lemire expressed his frustration to the Complainant that she had not undertaken all of the options they had spoken about with Mr. Préfontaine earlier.

Finally, at the end of the School year, S transferred to another School district.

The first issue before the Human Rights Tribunal on these facts was whether this behaviour constituted harassment. The Tribunal reviewed the Supreme Court's definition of harassment from an employment law case and reasoned, "*In a human rights context, the test for workplace harassment can be restated as unwelcome conduct related to prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment*."

Irrespective of the reason for harassment, its effect is "*an attack on the dignity and self-respect of the victim as an employee*", which the Tribunal found to be the effect of S's behaviour.

The next issue was whether the harassment constituted discrimination based on prohibited grounds, since "*human rights legislation does not prevent bad behaviour*." Though the earlier incidents did not, the later incidents contained comments concerning prohibited grounds. They were "*populated with insults and innuendo based on race, colour, gender and ancestry*."

Next, the Tribunal had to decide whether the Conseil should be held liable for harassment and discrimination effected by the actions of a third party.

Section 7 of the *Alberta Human Rights Act*, the provision on discrimination in employment, does not, unlike section 5 of Ontario's *Human Rights Code*, explicitly require an employer to maintain a workplace free of harassment. However, the Tribunal stated Alberta's Act should be read broadly so as to include such a duty. The Tribunal also observed, "*In a number of Canadian jurisdictions, courts and tribunals have found that the obligation to provide employment free of discrimination extends to include acts of third parties who are not employees*."

The Conseil had a duty to prevent discrimination including discrimination resulting from the acts of third parties in the workplace over which it had control and authority. The Conseil was best positioned to take effective remedial action to stop the harassment.

The Tribunal noted that the Conseil had taken several steps to reduce the harassment and restore the workplace which "*were for the most part reasonable*." However, crucial to the outcome was the fact that the Conseil lacked a coordinated or centralized approach, which resulted in a failure to grasp the seriousness of

the harassment considered in its entirety and in light of the increasing severity of the individual harassing acts over time.

While several different people were involved in different ways — including three Principals, two Vice Principals, a Superintendent, and an Assistant Superintendent — who each individually "*may indeed have been applying reasonable efforts, they often were responding to individual incidents without appreciation for the growing accumulation of events*." A clear example of this was the retraction of the cease and desist letter based on a misunderstanding of one event, which might have been reasonable if it were an isolated event, but it clearly was not.

The Tribunal went on to comment on what the Conseil ought to have done. It should have taken steps earlier "*to put greater distance between the complainant and S, to avoid putting S in direct contact with another of the complainant's family members, and to keep her from mingling with students of [her former School] after the expulsion*." Moreover, the Tribunal suggested: "*If one office or individual had been made aware and given authority to coordinate the efforts to address S's behaviour toward Ms. Malko-Monterrosa, it seems likely that the Conseil would have apprehended the growing problem and recognized the individual incidents as pieces in a pattern of increasingly objectionable conduct. In turn, this would likely have shaped a more effective response to eliminating it.*"

As a result, the Tribunal found the Conseil liable for discrimination against the Complainant for failing to take appropriate steps to deal with the harassment, and awarded damages of $7,500.00 to the Complainant.

The Complainant "*also sought a number of non-financial remedies to educate School administrators and others in human rights*". However, the Tribunal found that the administrators and the Conseil "*understood their responsibilities and took action to remedy the situation. While a coordinated approach to the situation would have benefitted all of the parties, I am unable to see that further educational remedies are warranted*".

This decision reinforces the interplay between Student Discipline and Human Resources where staff are harassed by a student(s) and the importance of dealing with such situations in an appropriate centralized manner with an effective plan of action. ■

Circumstances justified VP's decision to review student's cell phone messages

In *Constant-Daniels (Litigation Guardian of) v. Tournier*, 2014 SKQB 353, a student sued Riverside Community School and its Vice Principal for damages for breach of privacy and negligence.

The Plaintiff was text messaging during class and his Teacher asked him to stop. The Plaintiff initially ignored her requests to stop. He turned his back to her and continued frantically texting. The Teacher then confiscated his phone, gave it to the Vice Principal, and informed the Vice Principal about the incident.

With the Plaintiff present in his office, the Vice Principal checked the phone in the Plaintiff's presence and saw a text that referred to the theft of a vehicle. He asked the Plaintiff about this text message and the Plaintiff said he was not involved in the theft referred to in the message. The Vice Principal accepted the Plaintiff's explanation that he was not personally involved in the theft. The Vice-Principal reported the theft to the police without informing the Plaintiff's grandparents, who were his guardians. The Police took the Plaintiff with them to find the vehicle.

The Defendants argued that all employees of the School acted in a manner consistent with

their responsibilities as educators under provincial legislation, with a view to the safety and good order of the School.

The Vice Principal testified that it was not his normal practice to review any messages on confiscated cell phones. He did so in this instance because he was specifically concerned as to what the Plaintiff's text was about in light of the Plaintiff's unusual behaviour – his frantic texting and turning his back to his Teacher in an apparent effort to hide what was being communicated. The Vice Principal also had in mind the Plaintiff's two previous suspensions for fighting. He was concerned for the students' safety and concerned about the possibility of a bomb or scenario involving a planned fight with another student.

The Vice Principal consulted with the Principal, who instructed him to contact the Prince Albert Police Service. Although the theft was committed by others, not by a student and not at School, the Principal believed it was crime of which they should notify the Police.

The Vice Principal never imagined that the Police might ask the Plaintiff to text one of the thieves to illicit more information about the crime and then take the Plaintiff with them to find the car. A letter from the Police to the Plaintiff's lawyer confirmed that this was a deviation from Police Policy. The officer should have arranged for a staff member to be present when he was speaking to the Plaintiff, and the staff member should have contacted the Plaintiff's guardian before the student was taken off School property.

The Plaintiff acknowledged he was aware that the use of his cell phone during class hours was strictly prohibited. The School had a strict policy in place forbidding cell phones from class and mandating a penalty of confiscation of the phone for one day following a first infraction.

Three issues arose out of these facts. First, did the Defendants breach the Plaintiff's privacy rights? Second, did they breach the standard of care owed to the Plaintiff? Third, if there was any breach, did any harm to the Plaintiff result?

Breach of privacy claims are governed by *The Privacy Act*, RSS 1978, c P-24. Given that this was a public School, the analysis of privacy rights is also formed by relevant provisions of the *Canadian Charter of Rights and Freedoms*.

The Privacy Act states, in subsection 6(1): "*The nature and degree of privacy to which a person is entitled in any situation or in relation to any situation or matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others*".

The Court also reviewed cases regarding what constitutes a reasonable search under the *Charter*, noting that the Supreme Court of Canada set a modified standard for student searches. The leading case on searches conducted by School officials is the Supreme Court of Canada case of *R v MRM*, [1998] 3 SCR 393, which recognized that students have a diminished expectation of privacy in a School setting.

The regulated duties of Teachers and School Administrators are an important factor in the analysis. The need to operate the School safely requires balancing students' privacy rights. In this case, the Court found that the balancing favoured the Vice Principal's decision to check the phone. The Court explained:

As a general rule the Vice-Principal or teachers will not be scrolling through the contents of their cell phones. In the circumstances where the student is using the cell phone and texting messages in clear violation of school policy, a policy of which the student is aware, the student can anticipate a reduced expectation of privacy. In circumstances where the student's behaviour is extremely out of the norm, as was the case with the Plaintiff in the current circumstances, and the Vice-Principal establishes a reasonable basis for his concern for violence or threats to personal safety of a student or the general student body, an individual student's right to

privacy is outweighed by the duties and responsibilities of the teaching staff.

In light of this, the Plaintiff failed to establish a breach of the privacy he had a right to expect during School hours and on School property. Similarly, on the question of negligence, the Court found that the Defendants owed a duty of care to the Plaintiff as a student and that they satisfied that duty. The Defendants applied the cell phone policy in a prudent, appropriate and reasonable manner. The question of harm resulting from a breach did not need to be addressed because there was no breach. The Plaintiff's claim was dismissed. ■

Teacher's search of locker based on smell of marijuana reasonable

After a search of the contents of her gym locker revealed the presence of drugs, Ms. Ermine, a High School student, was charged with possession of marijuana for the purpose of trafficking under s. 5(2) of *The Controlled Drugs and Substances Act* and with possession of hydromorphone contrary to s. 4(1) of the *The Controlled Drugs and Substances Act*.

At Trial, Ms. Ermine argued that her right to be free from unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* had been violated. The Court found that there was no violation of her section 8 rights, and convicted her of the aforementioned offences in *R. v. Ermine*, 2014 SKPC 162.

The search that revealed the drugs was conducted by School staff. Mr. Isabelle was Ms. Ermine's physical education teacher. Another female student alerted Mr. Isabelle to the smell of marijuana in the girls' locker room. As a result of this discussion, he locked the gymnasium doors so nobody could leave and went and got the Vice Principal, Mr. Bradley. The two of them entered the girls locker room and determined which locker the smell seemed to be coming from. They asked Ms. Beattie, another teacher, to confirm independently where the smell was coming from.

Mr. Bradley opened the locker using a master key and confirmed that the smell was from this locker. Mr. Isabelle got Ms. Ermine and another student from the gymnasium and brought them into the locker room. The two girls acknowledged they were sharing the locker. Mr. Isabelle asked if there was anything in the locker he should be aware of. Ms. Ermine said there was a roach in the locker. The girls were asked to take all the contents of the locker to the physical education office.

In the office, Mr. Bradley and Ms. Beattie asked the two students to go through the contents of the locker. Mr. Bradley looked in Ms. Ermine's purse and found a bag of what appeared to be marijuana, a scale, a roach, some baggies, a lighter, a pill bottle, a cigarette package and identification with the Accused's name on it. One hydromorphone pill was found. The drugs were confiscated but the rest of Ms. Ermine's belonging were returned to her. She was sent home with a three-day suspension. The other student was allowed to return to class. The drugs were turned over to the Police.

The School had a "No Drugs" policy. A locker was considered a student's own personal space, but the School also had a policy that they could search a locker if there was anything in the locker that they felt would jeopardize the safety of students or would be a violation of the law. The basis for this policy was the School's view that the lockers, despite being a student's personal space, were owned by the School. These policies were in the Student Handbook.

The previous day, Mr. Isabelle had warned students about bringing contraband to School and he advised them that he could search their lockers for contraband or on the grounds of cleanliness. The accused was present when he raised this with the class.

Ms. Ermine had a reasonable expectation of privacy in her locker, although that expectation was diminished by the fact that the locker was shared. The Student Handbook made it clear that lockers were a convenience provided to students by the School and that the School maintained a right to inspect lockers, and Mr. Isabelle had warned students that they should not bring contraband to School and that he could search their lockers if need be. The Court was satisfied that Ms. Ermine received a Student Handbook, even if she never read it, and that Mr. Isabelle warned the class about contraband, even if Ms. Ermine did not remember him saying that.

Since Ms. Ermine had a reasonable expectation of privacy, s. 8 of the *Charter* requires that any search be authorized by statute, based on reasonable grounds, and conducted reasonably.

Mr. Isabelle, Ms. Beattie and Vice Principal Bradley were all acting within the scope of their authority as granted by s. 231(2)(d) of *The Education Act* of Saskatchewan. This section states that a teacher shall "*maintain, in cooperation with colleagues and with the principal, good order and general discipline in the classroom and on school premises*", which has been interpreted broadly to give staff the authority to conduct reasonable searches.

In light of the fact that three teachers all identified the smell of marijuana from the same locker, and Ms. Ermine admitted to there being a roach in the locker, the Court found they had reasonable grounds to conduct the search.

The search was also conducted reasonably. Here the Court highlighted several things the staff did right. They independently confirmed where the smell was coming from. They removed the students from class without telling the rest of their class what was going on. They dealt with the matter in the confines of the girls' locker room, the physical education office, and the Vice Principal's office, out of sight of the student body. They asked each girl to remove what belonged to them and a teacher looked through each of their items. The teachers did not damage or toss around the student's belongings.

The other student was allowed to return to class when nothing illegal was found in her possessions. Ms. Ermine was not handcuffed, grabbed, dragged, pushed or otherwise physically taken to the Vice Principal's office, but only told to go there, and she obeyed. At all times, Ms. Beattie, a female teacher, was present. Eventually the accused was given back all of her belongings except for the contraband, and was allowed to leave the School. The Court also noted, without saying that this was required to justify the search, that the accused admitted to having marijuana in the locker before its contents were searched. All these facts supported the conclusion that the search was conducted reasonably.

Ms. Ermine's section 8 rights were not violated. The Court admitted the evidence discovered at the School and Ms. Ermine was convicted of the offences noted above. Ms. Ermine would also be subject to possible discipline by the School. ■

Court nixes breathalyzer test as a pre-condition to attending prom

Does a mandatory breathalyzer test as a pre-condition of entry to a High School Prom infringe the rights of the attending students under section 8 of the *Canadian Charter of Rights and Freedoms* to be free from unreasonable search and seizure? That was the issue before the Court in *Gillies et al v Toronto District School Board*, 2015 ONSC 1038.

Soon before tickets for the Prom went on sale, the Principal of a Toronto High School informed the School Council and Student Advisory Council that he had decided to implement the use of breathalyzer testing at the 2014 Prom. In order that nobody would be singled out, the

breathalyzer would be applied to everyone. Two students objected and brought an Application to challenge the Principal's decision.

The Application could not be heard before the 2014 Prom. The Principal agreed to proceed with the 2014 Prom without a breathalyzer test. By the time the Court heard the Application, the Applicants had graduated. Nevertheless, because the legal issues raised were capable of repetition – the Principal intended to use a breathalyzer in 2015 – and because the case provided an opportunity to clarify the law and provide guidance concerning the authority of school officials, the Court proceeded to hear and decide the Application.

The Court explained that the main issue, stated above, could be broken down into several sub-issues, as follows:

1. Does the *Charter* apply to school authorities at off-site school events such as a prom?

2. If the *Charter* applies, is section 8 engaged when school authorities subject students to a mandatory breathalyzer test? This question requires determination of three separate issues:

a) Do students consent to a breathalyzer?

b) Do the students have a reasonable expectation of privacy to be protected by section 8?

c) If students do enjoy a reasonable expectation of privacy, is there a diminished expectation of privacy because of the context of a school prom?

3. If section 8 is engaged, what standard applies when reviewing the seizure of breath samples by school officials?

4. Is the seizure of breath samples unreasonable and a violation of section 8?

5. If there is a violation of section 8, is the violation saved by section 1? (The rights are subject to "*such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*").

1. Does the *Charter* apply?

The Court determined that the School Board is a branch of Government, and therefore subject to the *Charter*. The Court held that the Principal's decision to impose the breathalyzer test flowed from his powers and duties under the *Education Act* and its Regulations. It was also a step taken in furtherance of the Ministry of Education's *Provincial Code of Conduct*, PPM 128, which states that all members of the school community must not "*be in possession of, or be under the influence of, or provide others with alcohol or illegal drugs*".

The Court held that, despite the fact that the prom is held off-site, it is a school-sanctioned event, and the Principal acts in his capacity as a Principal under the *Education Act*. Therefore, the *Charter* still applies.

The Court referred to previous cases with respect to whether the *Charter* applies to a school board or school. This issue had not been definitively decided. In *R. v. M.R.M.,* [1998] 3 S.C.R. 393, the Court assumed that the *Charter* applied to schools with respect to the issue of student searches. In the *Gillies* case, the Court decided that the *Charter* applies to the School Board, as well as the School and Principal.

2. Is section 8 of the *Charter* engaged?

a) Do students consent to the search?

The right to be free from unreasonable search and seizure can be waived by consenting to a search, provided that the consent is informed and voluntary and the giver of consent was aware of his or her right to refuse and aware of the potential consequences of giving consent.

If students decided to attend the prom knowing about the breathalyzer requirement, the Court found that they would be implicitly consenting to breathalyzer screening as incidental to prom attendance. The Court also found that persons

of high school age could give or refuse consent and waive or not waive constitutional rights. Consent in these circumstances would also be voluntary because, although the prom was doubtless very important to most students, attendance is completely voluntary. Attendance at prom is also a privilege not a right.

Although the Court found implicit consent, it decided that this consent did not amount to a waiver of section 8 rights. The first problem was that the students were not aware of the nature of the conduct to which they were being asked to consent. It was not clear to the Court that the students would know who would administer the test, how, and what it could reveal. The Court also found that the students were not aware of their right to refuse to permit the school authority to administer the test and were not aware of the potential consequences of giving the consent.

The Court stated that there was no legal authority to support the School Board's submission that the standard of waiver of the right to be free from unreasonable search and seizure should be lowered because advance notice was given and because the search would be done by school authorities rather than law enforcement.

b) Do students have a reasonable expectation of privacy?

Section 8 is not engaged unless there is a reasonable expectation of privacy in the circumstances. The Court is required to consider the subject matter of the search, the claimant's interest in the subject matter, the claimant's subjective expectation of privacy in the subject matter, and whether this subjective expectation is objectively reasonable in the circumstances.

In this case, the subject matter was information regarding a person's blood-alcohol level. Students have an interest in this information, as it goes to their lifestyles and personal choices, and they would have a subjective expectation that their privacy would be respected. This information relates to one's body and person. In light of the heightened expectation of privacy historically recognized in one's person, students' subjective expectation of privacy is objectively reasonable.

c) Is there a diminished expectation of privacy because of the context of a prom?

It is a recognized principle of law that the expectation of privacy is diminished in a school setting. Students are aware that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the School. The Court found that the prom, as an off-site, school-sponsored activity, falls under the category of "school setting", and a diminished expectation of privacy therefore applies. While the expectation of privacy is diminished, section 8 is still engaged, and students have the right to be free from unreasonable search and seizure.

3. What standard applies when reviewing the seizure of breath samples by school officials to determine whether it is reasonable?

When conducting searches in a school setting, a warrant is not required, but a school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline, and that a search of a student would reveal evidence of that breach. Courts recognize that school authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Receipt of compelling information from a credible source may constitute reasonable grounds for conducting a search in the school context.

The Court was not convinced in this case that the Principal had formed anything more than a suspicion that some students would be drinking before the prom, and that this was not enough to meet the threshold required for a reasonable search. The Court observed that TDSB's Search

and Seizure Policy warns against conducting a search based only on reasonable suspicion.

4. Is the seizure of a breath sample unreasonable and a violation of section 8?

In order to be reasonable, a search must be authorized by a law, the law itself must be reasonable, and the manner in which the search is conducted must be reasonable.

The *Education Act* implicitly authorizes school authorities to conduct searches and seizures in appropriate circumstances and the statutory authorization given by the Act is reasonable in the school environment. However, the Court found that the breathalyzer would not be carried out in a reasonable manner because it had the potential to be humiliating and demeaning in having students line up to be tested in public view of their peers.

The Court also found that taking a bodily sample is not a minimally-intrusive search and that it seemed that there were several other effective methods to screen for alcohol consumption that did not involve a person's bodily integrity.

5. Is the violation of section 8 saved by section 1?

Section 1 of the *Charter* makes certain *Charter* rights, including section 8, subject to "*such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*". Since a violation of section 8 was established, the burden was on the TDSB to show that the violation was justified under section 1. The School Board was unable to do so.

The breathalyzer was not prescribed by law – nowhere in the *Education Act* or regulations did it indicate that a breathalyzer is an appropriate screening mechanism to fulfill a Principal's duties. The question of whether a breathalyzer is *prescribed* by law is a narrower question than whether a search is authorized by law. School authorities generally have authority to conduct reasonable searches, but in order to rely on section 1 to defend an unreasonable search, such a search must be prescribed by law. With this finding, the Applicants were successful. The breathalyzer could not be justified.

The Court went on to comment that the health and safety of students and maintaining school discipline is a pressing and substantial objective, but that the administering of a breathalyzer was not rationally connected to advancing this objective, was not minimally impairing, and was disproportionate to the deterrence of alcohol consumption.

Notwithstanding concerns with respect to the determination by the Court, the School Board has decided not to appeal this Decision. As a result, many of the significant findings remain to be confirmed at the appellate level. ■

HRTO limits evidence at hearing re parental care for special-needs child

LB v Toronto District School Board, 2015 HRTO 132, involved an Application alleging that the Toronto District School Board (the TDSB) failed to reasonably accommodate the disabled child Applicant, LB.

In an Interim Decision in this matter, the Human Rights Tribunal of Ontario decided that the TDSB was not entitled to call evidence at the hearing to show that LB's mother, SB, was neglecting to pursue appropriate medical treatment for him or that he should have been in a residential psychiatric treatment program. The Tribunal has the authority to limit evidence under its Rules of Procedure.

The Tribunal provided the following reasons for not allowing evidence to be introduced on the issues mentioned above:

(a) School Boards have a duty to accommodate a student regardless of whether the student is receiving any medical treatment;

(b) School Boards cannot order parents to place their children into a residential psychiatric program and cannot deny accommodation on the grounds that a student should be in such a program;

(c) there is an obligation imposed on School Boards by the *Education Act* to provide appropriate special education placements, programs, and services to their exceptional students, and parental conduct cannot be used as a justification for not meeting an exceptional student's needs; and

(d) a parent's "*fierce advocacy*" for his or her child must not prevent a School Board from accommodating the child's needs to the point of undue hardship.

In other words, even if it were true that LB's mother was not pursuing appropriate medical treatment for her or that LB should have been in a psychiatric treatment program, it would not negate the duty on the TDSB to accommodate LB to the point of undue hardship. Consequently, the Tribunal would not need to hear evidence on these points.

Conversely, the Tribunal decided to allow the TDSB to call evidence on the issue of whether SB took any action that prevented the TDSB from accommodating LB prior to his transfer to a private academy. Note that this evidence would not go to whether or not there is a duty to accommodate, but whether the TDSB was in fact able to accommodate. The Tribunal gave the following reasons for allowing the TDSB to introduce evidence on this issue:

(a) There are certain services, programs and accommodations which cannot be explored or implemented by School Boards without parental consent, including psycho-educational assessments, placement in a congregated exceptionality-specific special education class, referral for placement in a Provincial School or a care and treatment program, and it would be unfair to deny the Board the opportunity to enter into evidence all relevant information relating to LB's education and accommodation, if any, while he was a resident pupil of the TDSB; and

(b) In order to ensure a fair and just resolution of this matter, the parties must be given an adequate and equal opportunity to present their case.

While working with a special needs student, a School Board may encounter challenges that it may consider to be the result of choices made by the child's parent or caregiver, but any such difficulties must not be considered to negate the duty to accommodate and all reasonable efforts to accommodate must still be made.

While the Tribunal "restricted" the basis for calling evidence with respect to what a parent did or did not do, the evidence could be adduced if it related to the inability of the School Board to accommodate the needs of the student.

In addition, this is another Decision where the Tribunal has made it clear that a "fierce advocate" or "difficult parent" does not ameliorate the obligation of the School Board to accommodate the student. ■

HRTO rejects Application for lack of standing

In *RC v District School Board of Niagara*, 2015 HRTO 212, the Human Rights Tribunal dismissed an Application because the Applicant did not have standing to bring the Application.

The Application alleged that the School Board had committed discrimination based on creed. The School Board operates Eden High School. The Applicant, who identifies himself as a Secular Humanist, alleged that Eden is operated as a Protestant Christian Public High School and

that the School Board does not offer similar facilities to any other creed. Specifically, the Applicant alleged that the School Board works with Habitat for Humanity, a Christian organization, in an initiative that operates missionary trips to third world countries.

The School Board explained that Eden was founded in 1945 as a Christian College, and that the Ontario Conference of Mennonite Churches acquired Eden in 1948 and operated it as a Private High School until September 1989, when the public School Board in existence at the time assumed responsibility for the School. Eden continued to provide religious instruction until the Ontario Court of Appeal declared the provisions of the *Education Act* and the Regulation thereunder to be unconstitutional in 1990. The Regulations were changed and the School Board's position was that all schools, including Eden, complied with the regulatory changes. The School Board submitted that the curriculum taught at Eden is the same as that taught in other Board Schools. The curriculum is secular and does not include religious instruction.

The School Board stated that it has had agreements to use its space with Baha'i, Muslim and Greek Orthodox organizations, but has never received a request to use its space from an atheist or Secular Humanist organization. As for its relationship with Habitat for Humanity, the School Board explained that the relationship began when the School Board was looking for opportunities for its technology students to employ their skills. Habitat for Humanity was receptive, and students have participated in "home builds", locally and internally. Planning for the builds involves instruction in first aid, safety, construction, and other areas, but not religion. Students work with local participants and spend no time involved in or witnessing proselytization.

The Eden High School Spiritual Life Centre (SLC) was an intervenor in this case. The SLC is a privately-funded organization which receives no financial support from the School Board, but which organizes chapel services, retreats and trips, and provides spiritual and personal mentoring to Eden students upon request. The School Board permits the SLC to use an area adjacent to the cafeteria in Eden as a chapel. Chapel services are held prior to the start of the school day. The Tribunal found that, because the Applicant requested that Eden be "rebranded" as a completely secular institution, the SLC had a serious stake in the outcome. Its participation in the hearing would not delay the hearing, but because the Tribunal was not convinced that the SLC's full participation would assist the Tribunal, its intervention was limited to making opening and closing statements.

Section 29 of Ontario Regulation 298 states that a School Board may permit a person to conduct religious exercises or instruction in a School if this is not done by or under the auspices of the School Board, if it is not done during the school day, if no person is required by the School Board to attend, and if the School Board provides space for such activity on the same basis as it provides space for other community activities. The School Board submitted that Eden operates in compliance with the Regulation.

Such were the factual circumstances of the Application. The first issue, however, was whether the Applicant had standing. The *Human Rights Code* does not permit people to bring Applications in the public interest. A person must have a private interest or bring an Application on behalf of someone who has a private interest. The Applicant had children attending the Board's School, but not Eden. There was no denial of services or even any denial of an opportunity to use school facilities to the Applicant or his children.

The Applicant's status as a "taxpayer" or "citizen" or "member of the community" is not sufficient to establish standing. To have private-interest standing, the law requires a direct personal legal interest in the issue. In respect to having a personal legal interest in issues of public policy, an Applicant must show

that he or she is "*exceptionally prejudiced*" or "*specially interested*" in the issue – "*interested*" here meaning having a legal interest.

The Applicant argued that there was an "*overall perception*" of preference to Protestant Christianity at Eden and that it was contrary to the *Code* to present one creed as "normal". The Applicant submitted that perception of unequal treatment is a sufficient basis for an Application, relying on the Supreme Court of Canada's decision in *Ross v New Brunswick School District No. 15* (1996).

The Tribunal did not accept that the Applicant's perception of a creed preference at Eden was a proper basis for him to have standing. The Applicant misconstrued the Supreme Court's decision in *Ross*, a case in which a teacher's off-duty, anti-Semitic comments created a poisoned environment, and there was evidence that Jewish students at the School felt threatened. The Applicant in this case, by contrast, "*effectively seeks to complain about alleged activities to which he objects, but that do not involve him*".

Finally, the Tribunal explained that its finding that RC had standing in an earlier case – *RC v District School Board of Niagara*, 2013 HRTO 1382, (covered in KC LLP's March 2014 Newsletter) did not support a finding that he had standing in this case. In the 2013 Application, the Tribunal found that RC was discriminated against when the School Board did not allow him to distribute atheist literature in the Board's Schools but did allow the Gideons to distribute New Testaments.

While not commenting on whether there was or might be discrimination in light of what was occurring at Eden High School, the Tribunal noted briefly that an affected student may file an Application or the Human Rights Commission may file a public interest Application. ■

School Board liable ($156,000.00) for failing to follow Safe Schools Policy / Procedure

A sexual assault by one student on another in a high school washroom resulted in a civil lawsuit by the victim against the School Board for negligence. Judgment was issued in favour of the victim in in *KLP v Thames Valley District School Board*, 2015 ONSC 636.

The victim and the perpetrator were classmates. Both were special needs students. The assault occurred shortly after their class was dismissed. The victim alleged that the School Board failed to properly supervise at the time of the incident and to follow the requisite investigation and reporting procedures afterward, and that damage to her and members of her family resulted.

It was a Trial by Jury. The Jury had to answer first whether the School Board failed to meet the standard of care – that of "a careful and prudent parent" in the circumstances and in the aftermath of the incident. If that was answered affirmatively, the Jury was then asked to explain "briefly but clearly" the way or ways in which the School Board failed to meet the standard of care. The Jury was then asked whether the failure to meet the standard of care *caused* the victim to suffer loss. Finally, the Jury was asked to put a figure on the damages owed.

The Jury found the School Board liable for breach of the standard of care, with damages of $156,000.00. The Reasons were simply that, *after* the incident, the School Board failed to comply with the Safe Schools Policy and Safe Schools Procedure.

When the Jury presented its Verdict to the Judge, the victim brought a motion for Judgment in accordance with the Verdict. The School Board opposed the Verdict, contending that it could not stand because there was no

evidence that the Board failed to follow its Safe Schools Policy and, while there was evidence it failed to follow its Safe Schools Procedure, there was no evidence that this failure was the *cause* of any loss to the victim.

The presiding Judge issued Judgment in accordance with the Jury Verdict. The Judge explained that a Trial Judge's authority to disregard a Jury's Verdict is limited to a situation where there is no evidence to support the Verdict. Moreover, in accordance with the Ontario Court of Appeal's approach in *Stilwell v World Kitchen Inc.*, 2014 ONCA 770, the Jury's Verdict is to be afforded the context of all the evidence introduced at Trial, not simply portions mentioned in the Verdict, and the Jury's answers are to be given a "*fair and liberal reading*".

As in *Stilwell*, the Judge in this case found that there was evidence to support the Verdict. While the Verdict did not explain how the School Board failed to satisfy section 12 of its Safe Schools Procedure, the Judge observed that section 12 required the School to complete a Violent Incident Form to be used for, among other things, outlining the disciplinary action taken by the School, and section 12 required the School to report the incident to the Ministry of Education. Neither was done and no disciplinary action was taken against the perpetrator of the assault.

As for section 2.6 of the School Board's Safe Schools Policy, it states that the Board commits to ensuring that "*procedures are in place for dealing with the range of violent incidents that could occur […] and that these procedures are applicable to all students, staff and visitors […]".* While the victim focused in submissions on the fact that such Procedures are in place, the Judge explained that, to his mind, the Jury's focus was on the substance of section 2.6 It appeared to the Judge that the Jury considered the School Board's conduct and accepted the victim's theory that the School Board inadequately responded to the incident, thus causing damage to the victim, her mother and grandmother, because trust in the school system was irretrievably broken.

While technical compliance with the procedural and reporting requirements of a School Board's Policies and Procedures may not be all that is required in the aftermath of a serious incident such as occurred in this case, a breach of School Board Policies or Procedures offers an obvious argument to support allegations of negligence.

Due diligence is required by School Boards with respect to such issues. ■

Liability of School Board for injury to child who fell from School roof upheld on appeal

The previous edition (September 2014) of this Newsletter reviewed *Paquette (Litigation guardian of) v. Surrey School District No. 36*, 2014 BCSC 205, a case in which the British Columbia Supreme Court held the School Board liable to the Plaintiff for injuries he suffered when he fell off the roof of his School. The School Board appealed that decision. Its appeal was dismissed by the British Columbia Court of Appeal in *Paquette*, 2014 BCCA 456.

The Plaintiff, 12 years old on the date of the incident, and his friend climbed a cherry tree in close proximity to the School and got on to the roof. A Vice Principal heard the boys on the roof and yelled from an open window. To avoid getting caught, the Plaintiff jumped from a height of 20 feet onto a cement surface and was injured.

The School had prior problems with students accessing the roof and had taken some measures to prevent access to the roof. However, the Trial Judge found that it was foreseeable that the cherry tree close to the School might also be used, as it was by the Plaintiff, to access the roof and that a child might fall from the roof and get badly injured.

The School Board was found liable in negligence and for breach of its duties under the *Occupiers Liability Act.* The Plaintiff acknowledged contributory negligence and liability was apportioned 75% to the School Board and 25% to the Plaintiff by the Trial Judge.

In its appeal, the School Board contended that the Trial Judge erred in three ways:

a) in applying a standard of care amounting to perfection in assessing whether the School Board met its duty of care as an occupier;

b) in finding the School Board breached a duty of care in failing to prevent access to the roof of the School buildings by the cherry tree; and

c) in apportioning 75% of the fault for the accident to the School Board.

The School Board argued that the Trial Judge found that it was required to remove any tree close to a School, no matter how flimsy, because it is foreseeable that children will do stupid, dangerous things even when they know they should not. This amounted to a standard of perfection, the School Board argued.

The School Board also submitted that the Trial Judge misapprehended evidence regarding prior incidents of students accessing and of the School Board's knowledge of students climbing trees to access the roof. The Court of Appeal however concluded that it was not clear that the Trial Judge misapprehended any evidence.

Rather, the Court of Appeal affirmed:

The school board was aware of a risk and took some steps to reduce it by erecting a barricade and trimming trees. It was open to the trial judge to find a risk (that of the injury which materialized) was posed by the ornamental cherry tree in question. I would not interfere with the trial judge's conclusion that the School, by failing to deal with that evident risk, failed to discharge the obligation it owed under s. 3 of the Occupiers Liability Act, R.S.B.C. 1996, c. 337, which requires the School: 'to take that care that in all the circumstances of the case is reasonable to see that a person ... on the premises ... will be reasonably safe in using the premises.'

Also, because the Court of Appeal had concluded that the Trial Judge did not misapprehend any evidence and because it was clear that the Trial Judge was aware of the legal factors governing apportionment of liability, it was unwilling to interfere with the apportionment of liability.

The School Board submitted that the Plaintiff understood the risk of going on the roof, the risk was primarily created by the Plaintiff and the Plaintiff's departure from the standard of care was greater than that of the School Board, meaning the Plaintiff should bear more of the loss.

The Court of Appeal, however, noted that it was important to bear in mind the fact that the School Board had previously recognized the risk and deliberated on what to do about it. The Trial Judge held that that deliberation ought to have led to the removal of the risk posed by the presence of the tree. The Plaintiff's error, on the other hand, was "*precisely the type of misjudgment to be expected of a boy this age*".

It was open to the Trial Judge to find that the School Board, "*an institution charged with the care of children and obliged to take reasonable steps to ensure the safety of its premises, ought to have brought a greater degree of thought and care to the risk posed by children getting onto the roof than did the children doing the climbing*".

School Boards are held to a high standard of care. A School Board owes a duty of care to students in its care and must take all reasonable measures to prevent foreseeable harms to students. Since risk-taking behaviour and disobedience of School rules by students is foreseeable, the standard of care expected of School Boards is a high one. ■

Student sets off School sprinkler system; parents on the hook for $48,630.00 under BC School Act

British Columbia's *School Act*, in section 10, makes a student and the student's parents jointly and severally liable for damage to property of a School Board "*by the intentional or negligent act of a student*".

After Carson Dean, a student at a BC High School, inadvertently activated his School's sprinkler system and thereby caused extensive damage to the building, the School District sued and won $48,630 in damages in *Nanaimo-Ladysmith School No. 68 v. Dean*, 2015 BCSC 11.

The School District sought to recover damages from Carson Dean *and* his parents under section 10 of the *School Act*. The Court observed that, despite being enacted in the late 1950s, no Court had yet wrestled with the interpretation issue that arose in this case with respect to section 10 of the *School Act*. The issues in the case were as follows:

a) Was there an "*intentional act*" within the meaning of s. 10 of the *School Act*?

b) Was the student negligent in that he owed the School District a duty of care and, if so, did he meet the standard of care?

c) Was the School District contributorily negligent in respect of the damage caused?

Regarding the interpretation of "*intentional or negligent act*", the question was whether the act must be accompanied by an *intention to cause damage*, as argued by the Defendants. The student in this case had inadvertently activated the sprinkler system when he intentionally fastened his friend's padlock to a sprinkler head in the hallway as a prank.

The Court found that an intention to cause damage was not a requisite part of section 10 and that an intentional act was sufficient for the section to apply. This meant in effect that section 10 imposed liability on students and their parents beyond what the common law of negligence would impose. Although this finding effectively decided the matter in the plaintiff's favour, the Court went on to decide that Carson's actions also constituted common law negligence.

In order to be considered a negligent act, Carson must have failed to take reasonable care to avoid an act or omission which could be reasonably foreseen to cause harm. The key to a legal claim based on negligence is not the intention of the Defendant as to the consequences of his or her actions, but whether or not a duty of care was owed and, if so, whether the standard of care expected of the Defendant in the circumstances was breached.

Since it was reasonably foreseeable that by acting inappropriately Carson could cause damage to the School, the Court found that Carson owed a duty of care to the School.

The Defendants argued that there were public policy considerations that should negate the duty of care in these circumstances. The considerations they mentioned included: some level of impulsive behaviour is expected from boys of that age; hard use and wear and tear on school hallways is expected; to the untrained person, a sprinkler head is less akin to a fire alarm pull than it is to an exposed pipe or duct; if there is something easily accessible in a hallway that is dangerous and its danger is not obvious, everyone would expect it to be resistant to damage; and, parents reasonably expect the School Board, which is entrusted with the care and supervision of children, to operate a school that is reasonably resistant to extensive damage from childish lack of judgment.

The Court rejected this argument, explaining that it amounts to saying that a school assumes

all risk of inappropriate behaviour by children simply because they are children. Rather, the Court explained the considerations listed above are better addressed within the issues of whether Carson met the standard of care expected of him and whether the School was contributorily negligent. It was clear Carson owed the School a duty of care.

On the issue of whether Carson had breached the standard of care, the Court compared the facts of this case with several other cases. In other cases in which students were injured by horseplay, the Court observed that the injuries arose from unexpected physical effects from the use of objects that are normally played with by children, such as a plastic ruler in one case. In this case, however, the Court commented that "*no one would have expected that Carson would have any interaction with the sprinkler head, let alone 'play' with it*..

The fact that the exact type of harm was not reasonably foreseeable did not negate liability. Although the Court commented that most people would not be aware of how the sprinkler might be activated, most would have some understanding that it is a sensitive piece of equipment that should not be interfered with. This was not a freakish accident resulting from regular child horseplay. By interfering with the sprinkler head, Carson breached the standard of care expected of him. He might not have turned his mind to the damage that could occur, but, viewed objectively, he should have.

The Deans argued that a finding of 50% contributory negligence should be made against the School District because it should have installed protection for the sprinkler head, trained students not to touch the sprinkler system, and because the lunch supervisor should have better supervised Carson.

The Court disagreed, and found that the School District was not negligent. Sprinklers were protected in areas of the School described as "*active spaces*" where an object such as a ball might hit them. The hallway is not such a space. Carson was not able to reach the sprinkler without jumping. There was no evidence that interference with sprinkler heads by students was even an occasional problem that needed addressing.

Not teaching students not to touch the sprinkler system did not make the School District negligent. Carson knew he was not supposed to be touching the sprinkler head.

The lunch supervisor would have been circulating through the School. There was no evidence the lunch supervisor saw the incident. The Court pointed to existing case law as authority that the School was not required to provide constant supervision to deter bad behaviour, particularly of 14-year-olds such as Carson.

The Defendants did not establish that the School District was negligent and were found to be liable for the full amount of the School District's losses resulting from the incident.

The Decision is significant, both from the perspective of the section in the *School Act* as well as the principles applicable to the duty of care of students and their parents. ■

Insurer ordered to defend parents of child sued for failing to prevent bullying

In *D.E. et al. v. Unifund Assurance Company,* 2014 ONSC 5243, DE and LE (Applicants), parents of their minor daughter RE, applied to the Court for a declaration that their insurer, Unifund Assurance Company, had a duty to defend and indemnify them under their insurance against a lawsuit that had been brought against them.

DE, LE, and RE were sued by K, a minor, and K's mother for damages arising from RE's bullying of K. The claim against RE was for intentional acts of bullying, but the claim against DE and LE

was for neglecting to prevent, investigate and remedy the bullying.

The Applicants' homeowners' comprehensive insurance policy provided coverage for "*sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property damage arising out of: 1. your personal actions anywhere in the world*," subject to certain exceptions. DE, LE, and RE were all insured persons under the insurance policy. The policy excluded coverage for the "*failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment*."

In insurance law, an insurer is obligated to provide a defence to the insured if the pleadings against the insured allege facts which, if true, would require the insurer to indemnify the insured for the claim under the policy. In other words, if DE and LE could potentially be liable for damages to K, and their negligence fell within the meaning of "*your personal actions anywhere in the world*" but outside of the exclusion mentioned above, their insurer would have a duty to defend them against the lawsuit brought by K and K's mother.

The Applicants' insurer argued that the claim against the Applicants fell outside the scope of coverage of the policy.

Before explaining why the Applicants were covered by the policy, the Court reviewed some basic rules of insurance policy interpretation. First, the policy should be interpreted with a view to resolving ambiguities against the party that drafted the policy according to what is known as the *contra proferentem* rule. Second, the coverage provisions in the policy should be interpreted broadly, but exclusion provisions should be interpreted narrowly. Third, it is desirable, at least where the policy is ambiguous, to give effect to the reasonable expectations of the parties at the time the policy was signed.

The insurer argued, first, that the action against the Applicants was at its heart an action for damages for the intentional acts of RE, who was also an insured under the policy, whereas the Applicants contended that they were faced with a negligence claim.

The Court dispensed with the Respondent's argument quickly. As a rule, where multiple theories of liability are advanced to support the same claim for damages, an insurer may be ordered to defend the entire action even if some of the claims are excluded by the policy. The fact the policy may not cover the intentional acts of RE does not mean it would preclude coverage in favour of the Applicants for the claim in negligence.

The Court compared this case to that of *Durham District School Board v Grodesky*, (2012), in which the School Board sued a student and his parents alleging that the student had set a fire that caused damage to the School. The parents sued their insurer for indemnification under their homeowner's comprehensive insurance policy. The insurer in that case sought to rely on the exclusion for intentional acts, but because the action against the parents was framed in negligence, the Ontario Court of Appeal held in the parents favour.

As in *Grodesky*, the Court in this case held that the intentional tort claim against RE was distinct from the negligence claim against her parents, the Applicants. Coverage could therefore not be denied on the grounds that the Applicants' acts were intentional.

The insurer's second argument was that the exclusion in the policy for "*failure [...] to take steps to prevent sexual, physical, psychological or emotional abuse [...]*" applied to the Applicants. The Court did not find this argument persuasive either. This exclusionary clause was silent on whether it applies to only intentional or unintentional failure to prevent abuse or harassment, and had the insurer intended to exclude liability for both intentional

and negligent failure to prevent abuse or harassment, it could have done so using express language to this effect.

In accordance with the *contra proferentem* rule and the principle that exclusion clauses should be narrowly interpreted, the Court found that this exclusion clause was limited to intentional failure to take steps to prevent physical abuse or molestation. This was also consistent with the fact that the policy was a comprehensive policy intended to provide coverage for legal liability arising out of the Applicants' personal actions, worldwide.

Therefore, the Court issued a declaration that the Respondent had a duty to defend and indemnify the Applicants in relation to the claims made against them in the action brought by K and K's mother.

This Decision is relevant with respect to the issue of bullying. A victim may decide to bring an action against the School Board as well as the perpetrator and the parents of the perpetrator. An example of this would be *Karam v. Ottawa-Carlton District School Board* in 2014 (which is reviewed in the Keel Cottrelle Education Law Newsletter, September 2014) where liability was found against the School Board for failure to deal effectively with a bullying issue. Given this Decision, the "homeowner's policy" may be required to cover the parents and provides an additional "layer" for recovery of any damages. It is also relevant to School Boards given that, in the absence of this type of coverage, the School Board may be liable for all damages, and may not be able to recover such damages against the parents, except through their insurance. ■

Minority language education rights and School facilities

A dispute arose in Yellowknife, Northwest Territories, about whether the minority-language education rights of the Francophone community were being met by the territorial Government. A claim was brought against the Government by the Association des parents ayants droît de Yellowknife (Association).

The Trial Judge determined that Yellowknife's lone Francophone School was undersized and should be expanded to a capacity of 250 students, and that certain specialized facilities, including a gymnasium, science laboratory, home economics room, a space for special needs students, a room for teaching English as a Second Language, and a larger playground should be constructed. The Trial Judge found it constitutionally unacceptable to expect the Francophone students of the School to share under-used facilities at neighbouring Anglophone Schools. On the other hand, the Trial Judge did not accept the Association's argument that there was a constitutionally protected language right in the context of daycare and pre-kindergarten programs.

The Government appealed. The Association cross-appealed the finding that there was no right in the context of daycare and pre-kindergarten. In *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife,* 2015 NWTCA 2, the Court of Appeal allowed the Government's appeal in part and dismissed the Association's counter-appeal.

Minority-Language Education Rights

The minority-language education rights at issue in this case are those entrench in section 23 of the *Canadian Charter of Rights and Freedoms*. Subsection 23(1) states that citizens of Canada:

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary School instruction in Canada in English or French and reside in a province where the language in

which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Subsection 23(2) adds: "*Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language*."

Subsection 23(3) sets out the scope of the right to minority-language education at public expense:

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

The "number" in subsection 23(3) is determined by reference to those citizens included as rights holders in the first two subsections.

Who Possesses Section 23 Rights?

The Trial Judge accepted that non-rights holders could attend the School *and* be counted in the "numbers warrant" analysis under ss. 23. The Court of Appeal held that this was an error in law, which affected the factual findings about the number of potential section 23 students.

The Court of Appeal reviewed several cases that provide guidance on interpreting section 23. A constitutional compromise is embedded in section 23, the Court observed. It does not create a universal *Charter* right to minority language education or grant the courts a "*generic power to cure all past inadequacies in promoting minority language communities".* It also "*does not mandate generic policies to reverse or prevent assimilation*".

The *Charter* "*could have declared that every child in Canada was entitled to select his or her language of education*", but it did not, and so it "*cannot be interpreted in a way that ignores its fundamental scope*" by including those who would choose to attend a minority-language school but who do not fit within the "*number of children of citizens who have such a right*".

A collateral argument advanced by the Association was also rejected — namely, that the Commission scolaire had the right to manage and control the Francophone School, and was permitted to allow up to 20% of its students to be non-rights holders. The Court explained that the Commission scolaire's right to manage the School does not give it "*the ability to do whatever it wants, with a blank cheque to do it*." In fact, a Government may choose to exclude from admission to minority language Schools all persons who are not within the categories described in section 23.

Neither the Commission scolaire nor the Minister of Education has the power to interpret section 23 to determine who has rights under that section, the extent of those rights, or the facilities to which rights holders are entitled. The interpretive task falls to the Superior Courts.

Comparator Schools

Having clarified the scope of section 23, the Court turned to the issue of whether or not minority-language education rights holders received substantively equal access to education. This normally involves comparing schools.

The parties disputed the selection of comparator schools, each side pointing to the facilities available at other schools. The Association pointed to the facilities available in

the Anglophone Schools in Yellowknife, whereas the Government argued that those Anglophone Schools were much larger and not comparable. The Government pointed instead to other schools in and outside the Northwest Territories of a similar size.

The Trial Judge had decided on certain "comparator Schools", but the Court of Appeal concluded: "*In truth, there were really no meaningful comparator Schools.*" The two Yellowknife Schools selected by the Trial Judge were significantly larger than the Francophone School, and the smaller Schools were primarily in much smaller communities. "*If there was any reviewable error made with respect to comparator schools,"* the Court of Appeal stated, "*it was not in the selection of those other Yellowknife schools, but rather in overemphasizing the importance and helpfulness of the comparisons*".

The Court of Appeal emphasized that the *Charter* creates a right to equality, not to perfect schools, and that "*inadequacies in infrastructure, shortages of facilities, and deferred maintenance are common problems*". Minority-language schools must be realistic about the availability of resources. "*It is therefore not sufficient for the respondents to demonstrate that particular facilities would be desirable, nor are such facilities constitutionally mandated merely because they exist in the majority language Schools*".

While the larger majority-language schools had more diverse facilities, the Court of Appeal noted that both are operating at overcapacity, whereas the Francophone school was at undercapacity. And, while minority-language schools may never achieve the economies of scale of the majority-language schools, "*the 'numbers warrant' analysis requires attention to funding limitations common to the entire system*".

Use of Shared Facilities

The Court of Appeal addressed the use of shared and collateral facilities to support a minority language School in this way:

It is not per se constitutionally unacceptable to provide some collateral facilities in neighbouring schools. It does not follow, however, that sharing of neighbouring facilities is ipso facto *an acceptable solution. Each situation must be determined on its facts, having regard to all the components of the sliding scale analysis [established in* Mahe v Alberta, *[1990] 1 SCR 342]: the number of students, the cost of providing separate facilities, the practicality of sharing facilities, the pedagogical needs of the students, the homogeneity of the program, etc.*

The Court of Appeal discussed how rights holders are to make use of their right. "*As a general rule*," the Court explained, "*the s. 23 rights holders are required to marshal their resources*." "*Thus, the respondents cannot reallocate space to community or preschool uses, and then argue that the remaining space is inadequate*."

In light of the above findings and explanation of the law, the Court of Appeal found that expanding the Francophone School to include additional classrooms and specialized rooms as granted by the Trial Judge was not required by section 23, although the Trial Judge's direction to construct a gymnasium was upheld. The evidence at Trial established that the gymnasium sharing arrangements in place had not worked fairly for the Francophone School and it was reasonable to conclude that a gymnasium is a crucial feature in the minority language educational experience. Even the gymnasium, however, was a "*close constitutional call*".

Source of Funding

The Association argued that some of the minority-language school space should be allocated to community uses, not section 23

minority-language education uses, because some of its funding came from the Federal Government. They argued that the requirement to marshal their resources did not apply or applied differently to facilities constructed with Federal funding.

The Trial Judge accepted that significant amounts of funding for the School were obtained from the Federal Government, and held that the space built with this money should not all be recognized as minority-language school facilities. The inference was that the Northwest Territories Government could only demonstrate they had met their constitutional obligations by using their "own" money to provide minority-language school facilities.

The Court of Appeal, however, concluded that the source of funding was an irrelevant consideration. First of all, the Northwest Territories Government was dependent on Federal funding for 80% of its budget. The fact that the significant amounts of funding for the minority-language school came from the Federal Government was, the Court of Appeal stated, "*constitutionally meaningless, and hardly surprising*". Also, there was no evidence that the Federal Government has ever taken a position on how the space in the Francophone School should be used or that the funding was tied to some kind of use of the space.

Cross-Appeal on Daycare and Pre-Kindergarten

The Association's cross-appeal on the issue of daycare and pre-kindergarten was dismissed. Section 23 provides rights to "*primary and secondary school instruction*". The Association argued that pre-school francization is an important part of limiting assimilation, to which the Court of Appeal said, "*That may be so, but from a legal perspective it simply amounts to arguing that s. 23 should have covered more than it does*".

The Court noted that what is considered "*primary education*" might evolve, and if the Government legislated pre-kindergarten as part of primary education for majority-language schools, it would likely be required by s. 23 to offer similar levels of education for minority-language schools.

While the Association lost the cross-appeal, the Court of Appeal upheld the Trial Judge's finding that space existing at the School which was originally provided for daycare should not be counted as education space in the analysis of whether the facilities were adequate. This space was unsuitable as educational space.

Dissenting Opinion

One Justice of the Court of Appeal dissented from the Majority Opinion, concluding that, in addition to a gymnasium, satisfying section 23 required constructing additional facilities for the Francophone School including a kitchen, music and art room, a laboratory suitable for secondary school sciences, a room designated for teaching English as a Second Language, space for one-on-one work with special needs students, and a larger playground. The dissenting Justice agreed that the cross-appeal regarding daycare and pre-kindergarten should be dismissed.

The dissenting Justice also agreed that there was a legal error in the inclusion of non-rights holders in the analysis of the numbers of potential students, but concluded that this legal error did not substantively change the result. More deference was required to the Trial Judge's findings of fact regarding the adequacy and equality of school facilities.

The dissenting Justice concluded that the Trial Judge's findings of fact and choice of remedy were reasonable and entitled to deference, and offered this concise summary of the Trial Judge's findings on several important points:

The Trial Judge concluded that the Government's suggested approach of sharing ignored the special nature of minority language schools which resulted in systemic inequality. She noted the erroneous assumption that

solutions that apply in majority language schools can equally be applied to minority language schools. Reliance on off-site spaces impacts minority language schools much more negatively given the erosion of the linguistic homogeneity of the school environment. She reiterated that unlike small schools in small rural areas, the parents in Yellowknife have a choice of where to send their children, and the lack of infrastructure at École Allain St-Cyr contributed to students migrating to majority language schools.

The dissenting Reasons effectively mean that the issues are not definitively dealt with and there could be further future claims by the Association. ■

French language Schools awarded additional interim funds pending trial to prevent irreparable harm

The Conseil Scolaire Fransaskois (CSF) and others (Plaintiffs) applied for an interlocutory injunction requiring the Defendant, the Province of Saskatchewan, to provide funding for French Language Schools. Its Application was allowed, in part, by the Saskatchewan Court of Queen's Bench in *Conseil Scolaire Fransaskois v. Saskatchewan*, 2014 SKQB 285.

The CSF was mandated to manage and operate French Language Schools in Saskatchewan. The CSF believed that the Province, in continuing breach of section 23 of the *Charter* (quoted in prior article) did not provide the CSF with sufficient funding to carry out its function.

The CSF commenced litigation in 2011 for a Declaration that would define the Province's funding obligations under section 23 and for damages for past insufficient funding. On four prior occasions, the CSF obtained interlocutory injunctive relief for the provision of additional funding pending trial. The CSF submitted that for the 2014-15 school year, an operational subsidy of $3.26 million, an infrastructure subsidy of $1.98 million, and a contingency reserve amount of $350,000 were required. The CSF submitted that refusal of the requested funding would result in budget cuts causing irreparable harm to section 23 rights holders.

The test to for an interlocutory injunction is the tripartite test established by Supreme Court of Canada jurisprudence. The first part of the test is a preliminary and tentative assessment of the merits of the case. The second part answers whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; that is, harm not susceptible or difficult to be compensated in damages. The third part, called the "*balance of convenience*" test, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The Province took the position that the amount it provided under a previously determined funding formula satisfied its section 23 obligations, and that the CSF failed to adequately explain how it used its available funding. In the 2013–2014 fiscal year, the Province had implemented a new funding formula for all School Boards, which recognized certain differences between School Divisions and between English and French Schools that affected the Plaintiff's costs.

The Court applied the tests relating to interlocutory injunctions and allowed the Application in part. The Court found that there was a serious issue to be tried regarding the nature and scope of the funding rights and obligations under section 23 of the *Charter*. Another serious issue to be tried was whether the funding provided by the Province in the past and for 2014-15 complied with its funding obligations both with respect to operations and maintenance of infrastructure.

There was a meaningful risk of irreparable harm in the absence of injunctive relief, but the Court determined that the Plaintiff did not require $2 million as requested for the purpose of paying down its line of credit, and only required $1.26 million of the requested amount to rehire staff.

Given the amount of funding available for the 2014-15 school year, and the judicial determination of the past three years of funding, the balance of convenience favoured an interlocutory injunction to provide additional operational funding in the amount of $500,000.

The Court noted that the basic legal principles of section 23 were not in dispute by the parties. The parties agreed that, as the Supreme Court of Canada held in *Mahe v. Alberta,* [1990] 1 SCR 342 and in *Arsenault-Cameron*, 2000 SCC 1, section 23 rights include, where numbers warrant, the right to management and control by rights holders or their representatives over those aspects of education pertaining to their language and culture.

What was in dispute was the extent to which the CSF's right to make decisions about programs and services gave it the right to determine the level of funding required to deliver those programs and services.

The Court explained the issue and the law in this way:

It may sometimes be difficult to fully separate the right to management and control from the right to funding, as funding is for programs and services. That does not mean that the Government is obliged to fund any and all programs and services that the CSF decides are necessary to implement s. 23 rights, at the level determined by the CSF. Rather, it is for the CSF to exercise its right to management and control within the level of funding fixed by the Government, as long as that level complies with the Government's funding obligation.

A proper approach to the test for an interlocutory injunction in this context demands attention to the prospect of harm to the purposes of s. 23 of the *Charter*. With that in mind, the Court stated, "*A meaningful risk of impacts on recruitment and retention of students and staff, whether arising as a result of lack of sufficient staff, inadequate facilities, or the inability to provide adequate transportation services, for example, could constitute such harm.*" A risk that CSF would be prevented from providing access to an education of comparable quality could also satisfy the test, the Court noted. The onus was on CSF "*to prove that such harm has occurred or may occur before trial, although the bar it must clear is not high*."

The Court found that there was a meaningful risk of harm to CSF should it not obtain more funding. However, this does not end the matter. The likelihood and significance of the harm is then addressed in the context of the balance of convenience, in which the potential for irreparable harm "*to the Government*" must also be considered. Moreover, "*In the context of a Charter case, the balance of convenience also involves consideration of the public interest*".

Case law on section 23 has established that the Government should have the widest possible discretion in selecting the means by which its s. 23 obligations are to be met. The complex nature of policy-making as it relates to funding education and the recent implementation of a new funding formula in Saskatchewan were considerations the Court said should be kept in mind. The case law recognizes the Government's unique position in relation to the public interest. However, the Government does not have a monopoly on the public interest, and its discretion in implementing education policy is limited by the requirements of section 23.

Although the Government is owed some deference, it was open to the CSF to argue that its funding did not enable it to carry out its s. 23 mandate and was not sufficient to prevent irreparable harm. Having established this risk,

the Court conducted the balance of convenience test, weighing a wide variety of factors. The balance of convenience, the Court determined, favoured requiring the Government to bear the financial cost of preventing certain irreparable harms in the interim between this Judgment and Trial. The Court noted that the additional $500,000 in operational funding awarded represents 40% of the $1.26 million which counsel for the CSF advised was required by the CSF to hire back staff, which "*should significantly assist the CSF in addressing what it considers to be its most pressing issues*".

The CSF was partially successful in that it was awarded $500,000 for its current and future needs. However, the Court found that CSF had not made out a strong claim that the Province had failed to fully meet its funding obligations in recent years. In addition, on the specific issue of the need for roof repairs, the CSF did not establish a meaningful risk of irreparable harm with respect to roof repairs, as the CSF did not adequately explain why it previously failed to use its available infrastructure funding for the repairs. Finally, no such risk was established with respect to the reserve fund given the uncertainty surrounding unanticipated expenses. ■

Board satisfies procedural requirements in its decision to close Schools

When the Limestone District School Board (School Board) decided to close two Secondary Schools on condition that it could obtain funding to build a new intermediate Secondary School, the Sydenham District Association and five individual parents (Applicants) applied for Judicial Review of the School Board's decision. The Ontario Superior Court dismissed their application in *Sydenham District Assn. v. Limestone District School Board*, 2014 ONSC 7199.

The School Board operates three Secondary Schools in Kingston: Kingston Collegiate and Vocational Institute (KCVI); Loyalist Collegiate and Vocational Institute (LCVI); and, Queen Elizabeth Collegiate and Vocational Institute (QECVI). KCVI also houses an intermediate (Grades 7-8) French Immersion School called École Module Vanier (Vanier), while QECVI houses an intermediate School, Calvin Park Public School. The School Board decided that two of these Schools, KCVI and QECVI, would be closed.

Each of the central Kingston Secondary Schools faced declining enrolment. Given the grant-based structure of School funding in Ontario, the School Board faced increasing difficulties in providing meaningful curriculum choices for Secondary School students in central Kingston in each of the three regular program pathways– academic/university, applied/college and workplace.

Section 171(1)7 of the *Education Act* gives a School Board authority to "*determine the number and kind of Schools to be established and maintained […] and close Schools in accordance with policies established by the board from guidelines issued by the Minister*."

The purpose of the Ministry of Education's Pupil Accommodation Review Guideline (Guideline) is to ensure that a School Board's decision to close a School is made "*with the full involvement of an informed local community*" and "*based on a broad range of criteria regarding the learning experience for students*". The Guideline sets out requirements for the process to be followed before a School is closed, including the creation of an Accommodation Review Committee to advise the Board of Trustees, the provision of information to the public and mandatory consultation with the members of the community.

The School Board adopted Policy 15, School Accommodation, in accordance with the Ministry's Guideline. In its Policy, the Board

committed itself to the principle that *"[s]tudent curriculum and program needs will drive facilities planning".* The Policy set out a detailed process, including the creation of a Program and Accommodation Review Committee.

The School Board decided, in May 2011, to establish the Central Kingston Intermediate and Secondary Schools Program and Accommodation Review Committee (PARC) to consider the future of the Schools listed above. The PARC was composed of representatives from each of the five Schools, including three parent members, the School Principal, teaching and non-teaching staff, two Trustees, and the School Superintendent.

The PARC's mandate was to make recommendations to the School Board on program and accommodation options for the Schools under review. The PARC developed a list of criteria and a weighting system and applied these the many options before them. Over the period of November 2011 to June 2012, the PARC held fourteen working meetings which were open to the public and two further meetings to discuss the options with public participation thereafter.

The PARC eventually released a Majority Report and a Minority Report. The Majority Report recommended three options, its preferred option being that the School Board explore a three-School option that provides for adequate funding. Its alternative options were to have the School Board pursue funding for the construction of a new Secondary School and maintain one of the three existing Schools, or to convert QECVI into a composite High School and close KCVI.

A minority of the PARC members delivered a Minority Report because of concern that there was block voting by representatives of the other Schools and because of alleged process errors and disregard of public input. The Minority Report supported a three-School option.

The Board's School Enrolment/School Capacity Committee (SE/SCC) received the Majority and Minority Reports. The SE/SCC held a further 19 public meetings to consider the issues in the accommodation review. The SE/SCC received an additional report, prepared by Senior Board Staff, which responded to the PARC's Majority and Minority reports. The Staff report opposed the three-School option because of programming concerns and recommended the closure and consolidation of both KCVI and QECVI, conditional on funding from the Ministry to build a new composite Secondary School.

The Staff report was made available on the School Board's website and was presented to the SE/SCC at a public meeting. An additional meeting was held to give members of the public the opportunity to comment on the Staff report. Senior Staff then prepared a follow-up report summarizing the public input. This report was also made public and the SE/SCC held a further twelve meetings.

In June 2013, the SE/SCC voted 5-4 to accept a resolution that the School Board apply for funding from the Ministry of Education for the construction of a new School, that QECVI and KCVI be closed, and that students and programming be consolidated between the new School and LCVI. Two days later, the Board of Trustees unanimously approved this course of action.

The Applicants raised three main issues. First, they contended that the School Board failed to comply with Provincial Government Guidelines and the School Board's own Policy on School closing because it did not provide a deadline for closing the Schools, nor any decision on the future of École Module Vanier. Second, the Applicants submitted that they were denied procedural fairness because relevant information was not disclosed by the Board and because the public consultation process was merely perfunctory. And third, they argued the School Board's decision was unintelligible and thus unreasonable. The Court disagreed with the Applicants on all three issues.

At the outset of its Reasons for Judgment, the Court noted that it is the role of the elected School Board Trustees to weigh the competing considerations involved in deciding whether or not to close Schools and that the Court's role was only to inquire whether the School closing was authorized by law, whether there was adequate public consultation as required by law, and whether the decision was taken through a process was procedurally fair.

Compliance with Ministry Guideline and Board Policy?

The Guideline states that if the School Board voted to close a School, it "*must outline clear timelines when the School(s) will close*." Section 3.4 of the Board Policy provided that *"[i]f the Board's decision is consolidation, closure or program relocation, the change(s) will normally occur for the next School year unless specifically noted by the Board*."

The School Board did not set a deadline for the School closures. The Court, however, was concerned with "*the substance of what has been done by the School board, rather than technicalities*." Drawing on existing case law, the Court explained that guidelines and policies are not legislation or regulations, but "*tools designed to ensure a fair procedure before a decision is taken to close a School*." Substantial, not strict, compliance with a policy adopted for School closures is required.

Failure to specify a closing date did not amount to substantial non-compliance in light of the fact that there was no way for the School Board to know, at the time it voted to approve the plan, if and when an application for funding to build a new School might be successful. The School Board's Policy stated that the change(s) would *normally* occur in the next School year, but in the circumstances of this case, the date for implementing the change was contingent on funding.

Moreover, the Applicants did not identify any prejudice from the lack of a precise closing date. Rather, they identified only a "*technical irregularity with the Board's Policy*", which, the Court concluded, did not undermine the legality of the School Board's decision. As for the failure to deal with the future of Vanier, the French Immersion School housed in KCVI, the Court noted that, after the Applicants brought their Application, the School Board decided to relocate Vanier to the new School. There was, therefore, no basis to decide that the School Board's decision was incomplete.

Failure to Disclose Relevant Information?

The Applicants alleged that the refusal of the School Board to provide data from student survey known as Tell Them From Me (TTFM) to a KCVI parent representative on the PARC who had requested them was a breach of procedural fairness. The Applicants also complained about the late circulation of agenda packages and the changing financial information distributed during the PARC process and alleged that these cumulatively amounted to a denial of procedural fairness.

The Court explained that, given the nature of the decision to be made and its importance to the Applicants and others affected, the duty of fairness required the School Board to provide information sufficient to allow meaningful participation in the consultation process. The School Board also had an obligation under its Policy to respond to reasonable requests for information from the PARC.

Addressing the non-disclosure of the TTFM data, the Court explained that the question was not whether the TTFM data was arguably relevant, but whether non-disclosure undermined the right to participate in the consultation process. In the Court's view, it did not.

The Court found that the purpose of the PARC process was to determine how best to offer adequate student programs for central Kingston secondary students in a period of declining

enrolment. The TTFM data was only marginally relevant to the PARC's task. Non-disclosure of the TTFM data did not deny the PARC members information required to fulfill their mandate. The Minutes of the PARC indicate that when the members were selecting criteria, they explicitly rejected the Schools' TTFM outcomes as a criterion. The Court also noted that the data's reliability was questionable given the varying response levels in the three Schools.

As for the alleged late delivery of agenda packages PARC members, the Court found the timing should have been no surprise. Members were told that the agenda materials would usually be prepared the afternoon before the meeting, though at times this would not be feasible. Besides, the members were not confined to discussing information at the first meeting that information appeared on the agenda. Members could ask to revisit agenda items and materials.

With respect to the allegations of unexplained and changing financial information, the Court pointed out that the members were given the opportunity to ask questions and, in any event, the focus of the review process was on programming challenges, not financial considerations.

Overall, the Court found that the School Board had a wealth of information before it in making its decision, including the PARC's Majority and Minority Report, and the failure to disclose TTFM data did not deprive interested members of the public of an opportunity to engage in meaningful participation through the consultation process.

Perfunctory Public Consultation?

The Court contrasted the public consultations in this case with other cases in which School Boards were found to have breached the requirements of procedural fairness. For example, in both *Aitken*, [2002] O.J. No. 3026, and *Vecchiarelli*, [2002] O.J. No. 2458, the Trustees decided to close a School at a secret meeting. In another case, *Ross II*, [2000] O.J. No. 5680, the School Board failed to appoint an Accommodation Review Committee prior to the recommendation to close a School. In *Bezaire*, [1992] O.J. No. 1478, the School Board voted to close a number of Schools based on a consultant's report, without notice to the public or input from those affected.

By contrast, the Court held that the Limestone District School Board's consultation process in this case "*was far from perfunctory*." The Court referred to the sheer number of meetings that were open to the public, the public availability of key documentation online, and the invitation for direct public participation in several meetings.

Was the School Board's Decision Unintelligible?

The Court held that the School Board had clearly set out its planned course of action, which was to obtain provincial funding and build a new School. Since provincial funding had been received, any lack of certainty about the plan had been resolved.

Given the finding of the Court that the School Board had proceeded in an appropriate manner, the Application was dismissed. ■

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April 24, 2015

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